

This Opinion is not a  
Precedent of the TTAB

Mailed: September 22, 2021

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

*In re Aquatech Seafood LLC*

Serial No. 88524996

Aquatech Seafood LLC, pro se.

Angela Duong, Trademark Examining Attorney, Law Office 104,  
Zachary Cromer, Managing Attorney.

Before Cataldo, Heasley and Allard,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Aquatech Seafood LLC, seeks registration on the Principal Register of the mark HAPPY CLAWS LUCKY PAWS (in standard characters), identifying the following goods: “edible pet treats,” in International Class 31.<sup>1</sup>

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<sup>1</sup> Application Serial No. 88524996 was filed on July 19, 2019, based on Applicant’s assertion of a bona fide intent to use the mark in commerce under Section 1(b) of the Trademark Act; 15 U.S.C. § 1051(b).

Page references to the application record are to the downloadable .pdf version of the USPTO’s Trademark Status & Document Retrieval (TSDR) system. References to the briefs, motions and orders on appeal are to the Board’s TTABVUE docket system.

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of likelihood of confusion with the registered mark LUCKYPAW (in standard characters), identifying the following goods: "dog collars; dog collars and leads; muzzles," in International Class 18.<sup>2</sup>

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

### **Likelihood of Confusion**

We base our determination of likelihood of confusion under Trademark Act Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors enunciated in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*"), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); see also *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019).

We have considered each *DuPont* factor that is relevant, and have treated other factors as neutral. See *Zheng Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010) ("Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.")).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. See *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98

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<sup>2</sup> Registration No. 5937898 issued on the Principal Register on December 17, 2019.

USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“the various evidentiary factors may play more or less weighty roles in any particular determination”). Two key considerations are the similarities between the marks and the relatedness of the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (the “fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”); *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1672 (TTAB 2018).

## **I. Evidence**

In support of the refusal to register, the Examining Attorney introduced into the record the results of searches of merriam-webster.com defining HAPPY as “favored by luck or fortune: fortunate;” CLAW as “a sharp usually slender and curved nail on the toe of an animal;” LUCKY as “having good luck;” and PAW as “the foot of a quadruped (such as a lion or dog) that has claws.” (March 11, 2021 Denial of Request for Reconsideration at 20-34.)

The Examining Attorney further introduced into the record pages downloaded from the following third-party Internet websites, (February 19, 2020 non-final Office Action at 5-39; August 19, 2020 final Office Action at 5-37; March 11, 2021 Denial of Request for Reconsideration at 6-19; 74-110) showing Applicant’s goods and the goods identified in the cited registration, offered under the same marks:

Up Country (UpCountryInc.com) offers edible pet treats and dog collars;

Wild One (WildOne.com) offers edible pet treats and dog collars;

Beach Biscuit (BeachBiscuitLove.com) offers edible dog treats, dog collars, muzzles and leads;

Harry Barker (HarryBarker.com) offers edible dog treats and dog collars;

Two Salty Dogs (TwoSaltyDogs.net) offers edible dog treats and dog collars;

K9 Bytes (K9BytesGifts.com) offers edible dog and cat treats, and dog collars;

Alaska's Bakery (AlaskasBakery.com) offers edible dog treats, dog collars and leads;

Menard's (Menards.com) offers edible dog treats and dog collars;

Gunner Dog Treats (GunnerDogTreats.com) offers wild game bone dog treats and dog collars;

Good Dog Goods (GoodDogGoods.com) offers edible dog treats and dog collars;

Rocco & Roxie (RoccoandRoxie.com) offers edible dog treats and dog collars;

Paws in the Sand (PawsintheSand.com) offers edible dog and cat treats and dog and cat collars;

The Barker's Market (FranklinFarmersMarket.com) offers edible dog and cat treats, and dog and cat collars;

Petco (Petco.com) offers edible dog treats and dog collars;

PetSmart (PetSmart.com) offers edible dog treats and dog collars;

Pet Valu (PetValu.com) offers edible dog treats and dog collars;

Pet Super Market (PetSuperMarket.com) offers edible dog treats and dog collars;

Pet Supplies Plus (PetSuppliesPlus.com) offers edible dog treats and dog collars;

Hund Denmark (HundDenmark.com) offers dog collars and edible dog treats; and

K9 Carnivore (K9Carnivore.com) offers edible dog treats and dog collars.<sup>3</sup>

The Examining Attorney also submitted approximately ten use-based, third-party registrations for marks identifying goods of the sort identified in the involved application and the cited registration. (March 11, 2021 Denial of Request for Reconsideration at 35-73).

The Examining Attorney further introduced into the record all six live trademark applications and registrations for marks incorporating or consisting of the terms LUCKY and PAW(S), or their phonetic equivalent. (August 19, 2020 final Office Action at 39-51). These include, in addition to the involved application and cited registration, the following four registrations:<sup>4</sup>

Reg. No. 3372243 for the mark LUCKY PAWZ, identifying “pet boarding services; pet day care services;”

Reg. No. 4902205 for the mark LUCKY PAWS, identifying “computer game software for gaming machines, namely, slot machines and video lottery terminals; computer-gaming software; gaming software that generates or displays wager outcomes of gaming machines;”



Reg. No. 5632539 for the mark  identifying “plastic bags for disposing of pet waste;” and

Reg. No. 5945596 for the mark LUCKY FAUX PAW, identifying “fake rabbit’s foot key chain made out of fake fur.”

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<sup>3</sup> The Examining Attorney’s evidence indicates these companies include the top five pet product retailers in North America, namely, PetSmart, PetCo, Pet Valu, Pet Supplies Plus and Pet Supermarket. (March 11, 2021 Denial of Request for Reconsideration at 111-119).

<sup>4</sup> All marks are in standard characters unless otherwise noted.

To support its arguments in favor of registration, Applicant introduced into the record pages downloaded from the third-party commercial websites of pet treat contract manufacturers or “copackers” (July 29, 2020 Response to non-final Office Action at 40-53) explaining that “copackers” manufacture private label pet treats for resale by their customers. Applicant’s evidence also shows that a listing of the ten leading pet food companies by revenue in the United States does not indicate that they produce or sell pet leashes or collars. (February 12, 2021 Request for Reconsideration at 67).

Applicant further introduced into the record pages downloaded from informational websites (July 29, 2020 Response to non-final Office Action at 54-79; February 12, 2021 Request for Reconsideration at 40-46, 54-79) discussing human and animal illnesses arising from consumption of contaminated foods and pet treats.

Applicant also introduced into the record copies of search summaries and third party registrations downloaded from the Trademark Office’s Trademark Electronic Search System (TESS) (July 29, 2020 Response to non-final Office Action at 80-260; February 12, 2021 Request for Reconsideration at 63-66) listing registrations identifying pet foods and pet treats, but not pet collars, leads or leashes. None of the marks in these third-party registrations include the terms HAPPY CLAWS or LUCKY PAW(S), or otherwise are similar to the marks at issue. *Cf. G.B.I. Tile and Stone Inc.*, 92 USPQ2d 1366, 1369-70 (TTAB 2009).

Applicant introduced copies of TESS search summaries (February 12, 2021 Request for Reconsideration at 75-92) for marks including the term PAW(S), displaying serial number, registration number where applicable, mark and status as live or dead. The summaries do not include any information regarding the goods or services identified by the applied-for or registered marks. None of the marks include the term LUCKY PAW(S).

In addition, Applicant introduced into the record the Google search results for “hits” responsive to the query “lucky paws,” (February 12, 2021 Request for Reconsideration at 50-59) showing the term used in some capacity, either as a trademark or trade name, in connection with the following goods and services:

Pet adoption services – 23;

Pet beds – 2;

Pet resorts – 5;

Pet stores/supplies including food – 2;

Pet grooming – 4;

Pet training, walking and sitting – 3; and

Non-specified goods or goods/services unrelated to pets – 5.

None of the search summaries appear to associate the term “lucky paws” in relation to pet leashes, leads or collars.

## II. Analysis

### A. Similarity or dissimilarity and nature of the goods

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration....” *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1159 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

A proper comparison of the goods considers whether “the consuming public may perceive [the applicant’s and registrant’s respective goods] as related enough to cause confusion about the source or origin of the goods or services.” *Hewlett Packard*, 62 USPQ2d at 1004. Therefore, to support a finding of likelihood of confusion, it is not necessary that the goods be identical or even competitive. It is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such that they would be encountered by the same persons in situations that would give rise, because of the similarity of the marks, to a mistaken belief that they originate from the same source or that there is an association or connection between the sources of the goods. *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009).

The Examining Attorney’s website evidence demonstrates that the above-listed third parties offer the edible pet treats identified in the application and the dog leashes, leads, muzzles and collars identified in the cited registration, under the same

mark. Internet material is competent evidence of trademark registrability in ex parte appeals. *See In re Bayer AG*, 488 F.3d 960, 966, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007); *In re Reed Elsevier Props., Inc.*, 482 F.3d 1376, 1380, 82 USPQ2d 1378, 1381 (Fed. Cir. 2007). In this case, the website evidence introduced by the Examining Attorney shows on its face that third parties offer on their websites Applicant's products under the same mark as the goods identified in the cited registration. *See, e.g., Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1427-28 (TTAB 2014). We thus find that consumers would readily expect these goods could emanate from the same sources.

Although use-based, third-party registrations alone are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless may have some probative value to the extent they may serve to suggest that the goods at issue are of a kind that emanate from a single source. *See In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018); *In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993). In this case, the Examining Attorney's registration evidence serves to buttress the website evidence showing the goods of Applicant and the owner of the cited registration offered under the same mark by multiple third parties.

Applicant argues:

The practices of the largest pet food manufacturers represent what is reflective of the general marketplace, not home-based small businesses, e-commerce websites and independent pet shops. Contrary to

Examining Attorney's position, it is not common for pet food manufacturers to make dog collars, leads, and muzzles.<sup>5</sup>

Applicant's argument, based upon the evidence discussed above, relies upon an assumption that because the ten largest pet food manufacturers have not been shown to produce or sell dog collars, leashes, leads and muzzles under the same brand, consumers will not view these goods as emanating from the same source. However, the Examining Attorney's website evidence establishes that twenty third parties, including the top five pet product retailers, as well as smaller retailers, offer the products identified in the involved application and cited registration under the same trademark or house brand. The asserted practices of pet food manufacturers is not controlling here, particularly in light of the Examining Attorney's evidence regarding the practices of pet product retailers of all sizes producing edible pet treats as well as collars, leashes and muzzles. We are not persuaded by Applicant's arguments that certain of the products offered by these retailers are produced by third party "copackers" for branding and distribution. Regardless of who produces the goods at issue, the evidence of record indicates that these goods are commonly marketed under the same marks.

Applicant's reliance upon *In re Coors Brewing Co.*, 68 USPQ2d 1059 (Fed. Cir. 2003) also is inapposite because we are not comparing restaurant services with house-branded beers, or more broadly comparing goods with services. The Applicant in *Coors* demonstrated that only a very small percentage of restaurants also brewed and

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<sup>5</sup> 12 TTABVUE 18 (Applicant's brief).

sold beer under the same mark. In the case before us, Applicant has shown only that the ten largest pet food manufacturers do not appear to produce pet leashes, collars and muzzles. However, and as discussed above, the Examining Attorney's evidence shows that a significant number of pet product retailers – from the largest North American chain stores to smaller independent stores and e-commerce retailers – offer pet treats, collars, muzzles and leashes under the same marks. Comparable evidence was not present in the *Coors* appeal.

In further support of its argument that the practices of the largest pet food retailers are the best gauge of the relatedness of the goods, Applicant argues:

A search conducted using TESS of all the registered trademarks [owned by the top ten pet food retailers] resulted in over one hundred marks and not a single registration identified “Dog collars; Dog Collars and leads; Muzzles” as goods covered by the trademarks.<sup>6</sup>

The question, however, is not whether some companies engage in the separate activities. Rather, the question is whether there are companies that engage in both activities. Evidence that “a single company sells the goods ... of both parties, if presented, is relevant to the relatedness analysis,” *Hewlett Packard*, 62 USPQ2d at 1004, and the website and registration evidence submitted by the Examining Attorney is sufficient to show that “the consuming public may perceive them as related enough to cause confusion about the source or origin of the goods....” *Id.* As the Board said in connection with a similar argument based on third-party registrations, i.e., that there were many third-party registrations for the goods of the

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<sup>6</sup> 12 TTABVUE 19.

applicant that did not include the goods identified in the cited registration, and vice versa:

There is no requirement for goods to be found related that all or even a majority of the sources of one product must also be sources of the other product. Therefore, evidence showing only that the source of one product may not be the source of another product does not aid applicant in its attempt to rebut the evidence of the examining attorney.

*In re G.B.I. Tile and Stone Inc.*, 92 USPQ2d 1366, 1370 (TTAB 2009).

Similarly, there is no need for the Examining Attorney to establish that the owner of the cited registration will “expand” into edible pet treats. *See, e.g., Hydra Mac, Inc. v. Mack Trucks, Inc.*, 507 F.2d 1399, 184 USPQ 351 (CCPA 1975) (“the confusion found to be likely is not as to the products but as to their source”); *Orange Bang, Inc. v. Ole Mexican Foods, Inc.*, 116 USPQ2d 1102, 1119 (TTAB 2015) (no need to apply natural zone of expansion analysis under second *DuPont* factor). The respective goods need only be “related in some manner and/or the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). *See also On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Applicant argues that the involved goods are unrelated and, citing *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082 (Fed. Cir. 2014), Applicant contends that the

Examining Attorney is required to show “something more” than the mere fact that the goods are used together. Applicant’s reliance on *In re St. Helena Hosp.* is misplaced. “Something more” is only required in the context of comparing goods versus services, not goods versus goods, and where the relationship between the goods and services is obscure or less evident. *See id; see also In re Country Oven, Inc.*, 2019 USPQ2d 443903, \*13 (TTAB 2019). As explained in the TRADEMARK MANUAL OF EXAMINING PROCEDURE (“TMEP”) Section 1207.01(a)(ii) (Jul. 2021) (“Establishing Relatedness of Goods to Services”):

... when the relatedness of the goods and services is not evident, well known, or generally recognized, “something more” than the mere fact that the goods and services are used together must be shown. *In re St. Helena Hosp.*, 774 F.3d at 754, 113 USPQ2d at 1087 (finding that substantial evidence did not support relatedness of hospital-based residential weight and lifestyle program and printed materials dealing with physical activity and fitness). Therefore, when comparing services such as “restaurant services” with less apparently related goods such as “beer,” or “cooking classes” with “kitchen towels,” “something more” --beyond the fact that the goods are used in the provision of the services--must be shown to indicate that consumers would understand such services and goods to emanate from the same source.

Here, it was entirely appropriate for the Examining Attorney to introduce website evidence and used-based third-party registrations showing that the same entity has used and registered a single mark identifying the respective goods.

Contrary to Applicant’s arguments, the Examining Attorney’s evidence establishes that consumers may encounter Applicant’s goods and the goods identified in the cited registration offered by the same third parties and the subject of registration by the same third parties. This evidence establishes the relatedness of the goods. Further, it is not necessary for the Examining Attorney to prove likelihood

of confusion with respect to each of the goods identified in applicant's application; if there is likelihood of confusion with respect to any of Applicant's identified goods, the refusal of registration must be affirmed. "[L]ikelihood of confusion must be found as to the entire class [of goods or services identified] if there is likely to be confusion with respect to any [good or] service that comes within the recitation of [goods or] services in that class." *Primrose Retirement Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1033 (TTAB 2016) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981)).

We find that the second *DuPont* factor weighs in favor of likelihood of confusion.

**B. The similarity or dissimilarity of trade channels**

The third *DuPont* factor concerns "[t]he similarity or dissimilarity of established, likely-to-continue trade channels." *Stone Lion Capital v. Lion Capital*, 110 USPQ2d at 1161 (quoting *DuPont*, 177 USPQ at 567).

Because there are no limitations as to channels of trade or classes of purchasers in the recitation of goods in the involved application or cited registration, we must presume that the goods move in all channels of trade normal for such goods and are available to all potential classes of ordinary consumers thereof. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

As noted above, the Examining Attorney has introduced evidence that the respective goods are offered for sale on commercial websites of pet supply retailers of all sizes. Because these websites are accessible to the general public, they must be

presumed to offer Applicant's goods and the goods identified in the cited registration to all ordinary classes of purchasers, in this case, pet owners. This evidence supports a finding that Applicant's goods and the goods in the cited registration are offered in at least one common channel of trade, i.e., third-party websites of pet product retailers, to overlapping purchasers.

We find that the third *DuPont* weighs in favor of likelihood of confusion.

### **C. Strength of the Cited Mark / Number and Nature of Similar Marks**

Next, we evaluate the strength of the registered mark and the scope of protection to which it is entitled. The fifth *DuPont* factor focuses on the strength of the mark, and the sixth factor focuses on the number and nature of similar marks in use for similar goods or services. *DuPont*, 177 USPQ at 567. In determining strength of a mark, we consider both inherent strength, based on the nature of the mark itself, and commercial strength or recognition. *In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).”).

We are not persuaded by Applicant's argument that:

The elements in common between Applicant's and Registrant's mark are highly suggestive of the named goods and therefore, a weak indicator of source. Applicant conducted a search of the word “PAWS” using USPTO's search engine TESS, which resulted in 4,590 records. After reviewing the first 500 records. Applicant ascertained that 377 of the 500 records pertained to goods and/or services associated with pets. Applicant performed a search using Google® - search word “LUCKY PAWS” - to determine if “LUCKY PAWS” is used in association with pet-related goods and services in the broader marketplace. This generated 19,800,000 results. The first five pages were overwhelmingly related to

pets in some manner. Evidence was provided in Applicant's February 12, 2021 Request for Reconsideration. The results of these searches demonstrate that, the suggestive wording, "PAWS" and "LUCKY PAWS," as related to the goods in question, is commonly used in association with goods and services related to pets. Thus, it is a weak indicator or source and confusion is unlikely.<sup>7</sup>

Turning first to inherent strength, the evidence of record indicates that the mark LUCKYPAW evokes fortunate four-legged animals. LUCKYPAW thus possesses, at worst, a slightly suggestive meaning in connection with the dog collars, leads and muzzles identified thereby.

The Examining Attorney's evidence outlined above indicates the existence of two third-party registrations for the marks LUCKY PAWZ identifying pet boarding and



day care services; and identifying pet waste bags. Applicant's TESS search summary evidence only demonstrates that a number of PAW(S) formative marks have been applied for or registered. The evidence does not identify the goods or services associated with the marks, and none of the marks include a combination of the terms LUCKY and PAW(S). TESS listings are considered for whatever probative value they may have. *In re Broyhill Furniture Industries Inc.*, 60 USPQ2d 1511, 1513 n.3 (TTAB 2001) (listing of registration information considered for whatever probative value it might have, with Board noting that the listing did not indicate whether registrations issued on the Principal or the Supplemental Register). In this

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<sup>7</sup> 12 TTABVUE 13.

case, the very limited information supplied by the TESS listings limits the probative value thereof.

The Google search summary shows over twenty third parties (that appear to be related regional pet rescue agencies) use some form of the term “lucky paws” in connection with pet adoption services, while a total of sixteen more use a “lucky paws” formative in connection with pet beds, resorts, unspecified supplies, grooming and pet walking or sitting. The record thus indicates approximately forty third-party uses of “lucky paws” in connection with various products and services directed toward pets.

There are two limitations to Applicant’s Google search summary evidence. First, the results summaries are truncated to such an extent that they contain insufficient information upon which we may ascertain the nature of the use, if any, of the term “lucky paws” therein. Truncated results from search engines frequently are entitled to little weight. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007):

Bayer asserts that the list of GOOGLE search result summaries is of lesser probative value than evidence that provides the context within which a term is used. We agree. Search engine results—which provide little context to discern how a term is actually used on the webpage that can be accessed through the search result link—may be insufficient to determine the nature of the use of a term or the relevance of the search results to registration considerations.

*See also In re Thomas Nelson, Inc.*, 97 USPQ2d 1712, 1715 (TTAB 2011) (search engine results submitted by examining attorney not considered because they did not provide sufficient context to have any probative value). Similarly, in this case the proffered Google search summaries do not provide sufficient context for us to discern

the extent to which the use of “lucky paws” is trademark use or otherwise is relevant to our determination of the strength of the cited LUCKYPAW mark. Second, none of the search summary results specifically identify the pet leashes, leads, muzzles or collars identified in the cited registration.

Contrary to Applicant’s contentions, there is scant evidence of third-party registration of marks similar to the cited LUCKYPAW mark for related products or services. The number of third-party uses of “lucky paw” formatives for pet products and services, even overlooking the limitations of the search summary evidence, is more modest than that found to be determinative in other cases. *Cf. Juice Generation, Inc. v. GS Enters LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674-75 (Fed. Cir. 2015); *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1135-36 (Fed. Cir. 2015).

Further, the cited registration issued on the Principal Register without a claim of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. §1052(f), and we must accord the cited registration the presumption of validity provided for under Section 7(b) of the Trademark Act, 15 U.S.C. §1057(b). We thus presume that the mark LUCKYPAW is inherently distinctive with no need to acquire secondary meaning.<sup>8</sup>

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<sup>8</sup> There is no evidence regarding the mark’s commercial or marketplace strength. In an ex parte appeal, the owner of the cited registration is not a party, and the Examining Attorney is under no obligation to demonstrate exposure to or recognition of the cited mark in the marketplace. *In re Integrated Embedded*, 120 USPQ2d 1504, 1512 (TTAB 2016). For that reason, “in an ex parte analysis of the *du Pont* factors for determining likelihood of confusion ..., the [commercial strength] of the mark’ ... is normally treated as neutral when no evidence as to [marketplace recognition] ... has been provided.” TMEP § 1207.01(d)(ix) (Jun. 2021).

Viewing the record as a whole, we find that the registered LUCKYPAW mark is entitled to a slightly narrower than normal scope of protection to which inherently distinctive marks are entitled, primarily due to the evidence of third-party use of “lucky paw” formatives for pet related goods and services. *See Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (stating that likelihood of confusion fame varies along a spectrum from very strong to very weak). Based upon the totality of the record evidence, we find that the registered mark is mildly suggestive, but nonetheless distinctive, as applied to the identified goods.

The fifth *DuPont* factor is neutral, and the sixth *DuPont* factor is neutral or only slightly favors a finding of no likelihood of confusion.

#### **D. The Marks**

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant’s HAPPY CLAWS LUCKY PAWS mark and the registered LUCKYPAW mark in their entirety, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Capital v. Lion Capital*, 110 USPQ2d at 1160; *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014); *accord Krim-*

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Because there is no evidence of record regarding the commercial strength of the cited mark, this consideration is neutral.

*Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted). *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018).

“The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs. Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1721 (internal quotation marks omitted). *See also Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016). Consumers may not necessarily encounter the marks in close proximity and must rely upon their recollections thereof over time. *In re Mucky Duck Mustard*, 6 USPQ2d 1467, 1468 (TTAB 1988).

Applicant’s HAPPY CLAWS LUCKY PAWS mark subsumes the registered mark LUCKYPAW in its entirety, adding the preceding wording HAPPY CLAWS. “Marks have frequently been found to be similar where one mark incorporates the entirety of another mark, as is the case here.” *Coca-Cola Bottling Co. v. Joseph E. Seagram and Sons, Inc.*, 526 F.2d 556, 188 USPQ 105, 106 (CCPA 1975) (BENGAL is similar to BENGAL LANCER); *Johnson Publ’g Co. v. Int’l Dev. Ltd.*, 221 USPQ 155, 156 (TTAB 1982) (EBONY is similar to EBONY DRUM); *In re S. Bend Toy Mfg. Co.*, 218 USPQ 479, 480 (TTAB 1983) (LIL’ LADY BUG is similar to LITTLE LADY).

The presence or absence of a space between the two words LUCKY PAW(S) is an inconsequential difference; even if consumers noticed or remembered it, it would not serve to distinguish these marks. *In re Iolo Technologies, LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010) (finding ACTIVECARE and ACTIVE CARE are similar); *Seaguard Corp. v. Seaward Int'l, Inc.*, 223 USPQ2d 48, 51 (TTAB 1984) (SEA GUARD and SEAGUARD are “essentially identical”); *Stock Pot, Inc. v. Stockpot Rest., Inc.*, 220 USPQ 52, 54 (TTAB 1983), *aff'd* 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984) (“There is no question that the marks of the parties [STOCKPOT AND STOCK POT] are confusingly similar. The word marks are phonetically identical and visually almost identical.”). Similarly, the difference between plural and singular word forms LUCKY PAWS and LUCKYPAW is of little consequence in comparing marks under Trademark Act § 2(d). *See. e.g., Wilson v. Delauney*, 245 F.2d 877, 114 USPQ 339, 341 (CCPA 1957); *Chicago Bears Football Club v. 12th Man/Tenn. LLC*, 83 USPQ2d 1073, 1077 (TTAB 2007).

Applicant’s mark also includes the leading term HAPPY CLAWS, suggesting a fortunate animal with curved nails, or claws, on its toes. The term HAPPY CLAWS is also prominently placed at the beginning of the mark. We accordingly find this term to be equally distinctive of the goods as LUCKY PAWS. However, we find that both Applicant’s HAPPY CLAWS LUCKY PAWS mark and the registered LUCKYPAW mark connote fortunate pets with paws or claws.

We acknowledge that the presence of HAPPY CLAWS as the leading term in Applicant’s mark differentiates it visually and aurally from the registered mark. This

point of distinction, however, does not significantly diminish the strong similarities in connotation and overall commercial impression engendered by these two marks. Based upon the above analysis, we find that HAPPY CLAWS LUCKY PAWS is more similar to the mark LUCKYPAW than dissimilar in terms of appearance, sound, connotation, and commercial impression. As a result, consumers encountering HAPPY CLAWS LUCKY PAWS and LUCKYPAW could mistakenly believe the former is a variation on the registered mark used to identify a line of edible pet treats emanating from the same source as registrant's dog collars, leads, leashes and muzzles. *Double Coin Holdings Ltd. v. Tru Development*, 2019 USPQ2d 377409, \* 7 (TTAB 2019) (“Here, ROAD WARRIOR looks, sounds, and conveys the impression of being a line extension of WARRIOR.”). “Even those purchasers who are fully aware of the specific differences between the marks may well believe, because of the similarities between them, that the two marks are simply variants of one another, used by a single producer to identify and distinguish companion lines of products.” *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985).

For these reasons, we find that the marks are more similar than dissimilar. The first *DuPont* factor thus also weighs in favor of finding a likelihood of confusion.

#### **E. Conditions of Sale**

Under the fourth *DuPont* factor, we consider “[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567.

Applicant argues:

potential customers are likely to be the consumer that is seeking a single-ingredient, preservative-free, not made in China, treat for their cat or dog. This type of customer will be well-informed, concerned about what they feed their pet, and willing to spend more for a high quality, higher-end pet treat. All of these factors describe a more sophisticated buyer, which ultimately lessens the likelihood of confusion with other marks. As pets are increasingly considered part of the family, a death or injury of a pet due to recalled pet products is a compelling reason to be well informed and to exercise care in purchasing decisions.<sup>9</sup>

However, the goods identified in the involved application and cited registration are not restricted by trade channel or price point, and will be available to all interested purchasers. While some purchasers of pet products may be discriminating in their selection, others may not exercise as great a degree of care. The goods at issue include pet products offered to all types of consumers, including ordinary consumers exercising an ordinary degree of care. Nothing about the identified goods suggests that the consumers are necessarily sophisticated or that the conditions of sale would mitigate any confusion that would otherwise be likely. The standard of care is that of the least sophisticated potential purchaser. *Stone Lion Capital v. Lion Capital*, 110 USPQ2d at 1163 *cited in In re FCA US LLC*, 126 USPQ2d 1214, 1222 (TTAB 2018) *aff'd* 778 Fed. Appx. 962 (Fed. Cir. 2019) (“Board precedent requires our decision to be based on the least sophisticated potential purchasers.”).

In the absence of stronger evidence relating to the degree of care ordinary purchasers exercise with regard to pet treats, leashes, leads, muzzles or collars, the similarity of the marks and goods outweigh Applicant’s assertion that purchasers are sophisticated or careful in their purchases. *See HRL Assocs., Inc. v. Weiss Assocs., Inc.*,

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<sup>9</sup> 12 TTABVUE 16-17.

12 USPQ2d 1819, 1823 (TTAB 1989), *aff'd*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decisions, and expensive goods).

Moreover, were we to accord a level of sophistication to the purchasers of the goods at issue, even sophisticated purchasers are not immune from source confusion. *See In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (citing *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) (“Human memories even of discriminating purchasers...are not infallible.”)).

### **Conclusion**

When we consider the record and the relevant likelihood of confusion factors, and all of Applicant’s arguments relating thereto, including those arguments not specifically addressed herein, we conclude that despite evidence of slight weakness of the registered mark, ordinary consumers familiar with dog leashes, leads, muzzles and collars offered under the registered mark LUCKYPAW would be likely to believe, upon encountering Applicant’s HAPPY CLAWS LUCKY PAWS mark, that its edible pet treats originated with or are associated with or sponsored by the same entity.

**Decision:** The refusal to register Applicant’s mark is affirmed under Section 2(d) of the Trademark Act.